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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

J. P. STEVENS & CO., INC.,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

and

MILDRED G. BAILEY, ET AL, EMPLOYEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review a decision which that Court has rendered in

a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

THE OPINIONS AND JUDGMENT IN THE COURT BELOW AND THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Opinion of the United States Court of Appeals for the Fifth Circuit, and the Special Concurring Opinion in that Court, have not yet been printed in the official reports, but may be found in the following unofficial reports:—76 LRRM 2817 (1971) and 65 Labor Cases ¶11,608 (1971). The Opinions, along with the Judgment of the Court, are set forth in the Appendix to this Petition.

The case came to the Court of Appeals upon Petitions for Review of a Decision and Order of the National Labor Relations Board. The Decision and Order of the Board, 179 NLRB No. 47 (1969), is likewise printed in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The Judgment of the Court of Appeals is dated April 13, 1971, and was entered on that date.

Jurisdiction to review, by Writ of Certiorari, the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 USC §1254(1).

QUESTION PRESENTED

In a situation where an overwhelming majority of employees have, in an election conducted by the

Labor Board, voted against Union representation—and where a determinative number of such employees have established by sworn testimony, under examination and cross-examination in a Labor Board hearing, that they signed Union cards upon representations that the cards could not have any compulsory effect of any sort except to "bring on an election" and that only by winning such election would the Union be able to require recognition as the employees' representative—and where these employees have intervened as litigants and have actively opposed the Union's being fastened upon them as their "representative"—in such circumstances, is it not a misinterpretation and misapplication of this Court's decision, in the *Gissel* case, for the Labor Board to require that the Union be recognized and dealt with as the representative of these employees?

STATUTORY PROVISIONS INVOLVED

Provisions of United States statutes pertinent to this case are as follows:

> "Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . and shall also have the right to refrain from any or all of such activities . . ."
>
> 29 USC §157

> "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with

the representatives of his employees, subject to the provisions of section 159(a) of this Title".

29 USC §158(a)(5)

"If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof".

29 USC §159(c)(1)

STATEMENT OF THE CASE

In a secret ballot election, conducted by the National Labor Relations Board on April 22 and 23, 1968, at the instance of the Textile Workers Union of America, AFL-CIO, the employees at the Petitioner's[1] plant in Statesboro, Georgia, voted upon the question:

"Do you wish to be represented for purposes of collective bargaining by the Textile Workers Union of America, AFL-CIO?"

By a margin of 198 to 110, the employees' answer was—"No" (73[2]).

Shortly thereafter—but not upon the basis of any matters involved in the present case—the Board's Regional Director set aside the election and directed the holding of a new election (73). Although the Company has not in any manner opposed the holding

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[1]Hereinafter referred to as the Company.

[2]Unless otherwise indicated, page references are to the printed Appendix filed in the Court below.

of a re-run election, no further election has ever been conducted.

Instead, and by another route, the Board arrived at an order directing the Company to bargain and deal with the Union as the representative of the employees at the Statesboro Plant.

Approximately four months after the election the Union filed a charge with the Board, asserting that the Company had violated Section 8(a)(5) of the National Labor Relations Act, in that the Company had failed to bargain with the Union on February 17, 1968, when the Union first requested recognition, and "thereafter".

A complaint upon this charge was, on October 4, 1968, injected, over the Company's opposition (27) into a hearing already underway on other charges. Such other charges were that the Company had violated Sections 8(a)(1) and (3) of the Act, in discharging three employees and in failing to hire an applicant for employment, and in that certain supervisors had been guilty of improper statements and remarks to employees.

At this juncture, 117 of the employees at the Statesboro Plant obtained counsel and intervened in the Labor Board proceedings[1]. At all stages of the case from that time forward these intervening em-

[1]Such intervenor employees are designated in the caption of this Petition as "Mildred G. Bailey, et al".

ployees have actively opposed the efforts of the Union and the Board to require that the employees at this plant be represented by the Union.

The trial of the issue as to whether the Company should be required to recognize and deal with the Union as the representative of the employees centered around the introduction into evidence of the Union's "authorization cards" and was essentially an inquiry into the circumstances and representations involved in the Union's obtaining of such cards.

92 employees testified in derogation of such cards and their signing of them. Most of these witnesses testified that they did not read the card, nor did anybody read it to them. The substance of the testimony of all 92, as each recounted his individual circumstances, was that they signed the cards, or authorized the signing of them, only because of representations: —that the purpose of the cards was "to get an election"—and that the cards could not have any compulsory effect of any sort except to "bring on an election"—and that only by winning such election would the Union be able to require recognition as the representative of the employees at this plant.

The cards of these 92 witnesses were controlling in number, as to whether the Union ever had legally valid authorizations from a majority of the employees. The Trial Examiner and the Board found that the highest card majority the Union reached at

any time was 58, on April 20, 1968, just prior to the election (140[1]).

Thus the elimination of the cards of the 92 witnesses referred to above—or as many as 58 of them —would mean that the Union never at any time had a card majority.

In finding, however, that the Union attained a card majority prior to the election, the Trial Examiner and the Board counted the cards of all of these 92 witnesses who testified in repudiation of the cards and only arrived at a majority by doing so.

To such counting of cards, the Board added one other element, that is, its finding that the Company, regardless of detailed explanation and defense, was guilty of the 8(a)(1) and (3) offenses charged (143).

Thereupon, despite the secret ballot vote of a majority of all the employees against the Union in the Board election, and despite the countering of even a card majority by the testimony of the employees at the Board hearing—still the Board decreed that the employees must have the Union as their representative and that the Company must deal with the Union as the employees' representative (143, 147).

The Court below directed that this order of the Board be enforced, though one of the three members

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[1]The Trial Examiner and the Board found that when the Union first demanded recognition, it did not in truth have valid cards from a majority of the employees (123).

of the Court panel, specially concurring, expressed "misgivings as to the propriety here of the Board's" issuing a bargaining order instead of conducting "a re-run election" (30a).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

The Setting And Circumstances Of This Case

In 1969, this Court held that "Union authorization cards", under circumstances there delineated, may constitute a basis for requiring an employer to bargain with a Union as representative of his employees. *National Labor Relations Board vs. Gissel Packing Co., Inc.*, 395 US 575, 89 S Ct 1918, 23 L Ed 2d 547.

That decision overturned the holding of several of the Courts of Appeal[1], and there is today, in the field

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[1]The Fifth Circuit, for example, generally rejected authorization cards as a means of achieving representational status.

> " 'Laboratory conditions' are conspicuous by their absence in many cases involving selection of a bargaining representative by the use of authorization cards. The Board itself has said that this is 'a notoriously unreliable method of determining majority status of a union' ".
>
> *National Labor Relations Board vs. Southland Paint Company*, 394 F. 2d 717, 725 (5th Cir., 1968)

The Fourth Circuit said:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check', unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to

of labor relations, increasing confusion as to what are the proper applications and limitations of this Court's ruling in the *Gissel* case.

The circumstances of the present case urgently point up the need for clarification of the meaning of *Gissel*. This case is a striking example of a situation in which a Court of Appeals, undertaking to reverse its course by reason of *Gissel*, has clearly traveled in an opposite direction, far beyond the intent of this Court.

The salient factors and circumstances here are as follows.

Upon the request of the Union and at a time determined by the Union and the Labor Board, an elec-

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such card checks. This, the Board has fully recognized. So has the AFL-CIO".

National Labor Relations Board vs. S. S. Logan Packing Company, 386 F. 2d 562, 565 (4th Cir., 1967)

The Second Circuit declared that the concept of establishing Union representation through authorization cards "is an abomination", and that:

"The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7".

Schwarzenbach-Huber Company vs. National Labor Relations Board, 408 F. 2d 236, 249, 250 (2nd Cir., 1969)

The views of the Courts of Appeal in other circuits were to similar effect.

tion was held among the employees at the Company's Statesboro Plant.

The Union and the Board proceeded to that election though well aware of the asserted unfair labor practices which—as they now claim—prevented it from being a fair election.

In the anonymity and privacy of secret balloting, the employees voted against the Union by a wide margin.

The election was set aside and a new election directed. This was done, however, not on the basis of any unfair labor practices then, or now, claimed to have been committed by the Company[1].

The Board has, however, never conducted, nor sought to conduct, the directed re-run election.

Months after the election, the Union filed a charge against the Company, claiming that the Company

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[1]As a matter of election procedure, and not claimed to be in the realm of unfair labor practice at all, the Board's Regional Director ruled, under the Board's then new *Excelsior* doctrine, that the Company should have turned over to the Union a list of the employees' names and home addresses several weeks in advance of the election—in addition to the usual election list of employees, which the Company did furnish, as had been traditionally required, two days ahead of the election. At that time the validity of the Board's new requirement was the subject of varying Court rulings, and neither the Court of Appeals for the Fifth Circuit nor this Court had held that such requirement was valid.

should have recognized and bargained with it, from and after the time it first demanded recognition.

The finding of the Trial Examiner and the Board was, however, that when the Union first and formally demanded recognition and asserted to the Company that it had obtained "authorization cards from the majority" of the employees, such claim was not true or valid (123).

Belatedly and apparently as an afterthought and over the Company's objections, the new charge of failure to bargain was consolidated with the earlier 8(a)(1) and (3) charges, after trial on those earlier charges was already underway.

Upon its becoming publicized that the Union and the Board were seeking to require the Company to bargain with the Union as representative of the employees despite the outcome of the election, 117 of the employees obtained counsel and intervened in the Board proceedings. They took no position or part in the litigation of the 8(a)(1) and (3) charges against the Company. Then and at all subsequent stages of the case, however, they vigorously opposed any decree establishing the Union as the representative of the employees or directing the Company to deal with the Union as the representative of the employees.

The presence of these employees as active litigants is one of the unique aspects of this case — their position being that whatever wrongdoing may have been found against the Company they urgently oppose the

ordering of any so-called "remedy" which fastens the Union upon the employees, as their bargaining "representative", in contravention of their choice and desire.

Upon this issue of whether the Company should be compelled to bargain with the Union as the employees' representative, the trial was chiefly and essentially a probing of the circumstances under which the employees signed "authorization" cards for the Union.

II.

The Labor Board Here Based A Bargaining Order On Union Authorization Cards Which, Under This Court's *Gissel* Decision, Were Invalid For Such Purpose

As has been outlined in the Statement Of The Case, 92 employees gave testimony, under thorough examination and cross-examination, refuting the effect and validity of the cards obtained from them.

Most of the 92 testified that they did not read the authorization card and that it was never read to them[1].

All 92 testified to the effect that they signed the cards, or authorized someone to sign for them, only because of representations to them: — that the purpose of the card was "to get an election" — and that

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[1]There was included in the "small print" on the card a sentence stating that the Union should be the employee's "representative in collective bargaining over wages, hours, and all other conditions of employment".

the cards could not have any compulsory effect of any sort except to "bring on an election" — and that only by winning such election would the Union be able to require recognition as the representative of the employees at this plant.

It is also to be remembered, from the Statement Of The Case, that the Union's card majority never was more than 58, and that in reaching that majority the Trial Examiner and the Board counted the cards of all of these 92 employees who had testified in derogation of the cards.

Each of these 92 witnesses recounted the circumstances surrounding his signing of a card and the representations made to him prior to his signing. The following are typical excerpts from the testimony of these witnesses:

> "I was in the kitchen busy". "They [a Union organizer and a fellow employee] asked me to sign the card so they could have an election". I "had already told them" I was "not for the Union" and "would not vote for the Union". "They insisted that — just to sign it to have the election" (474-477).
>
> "He [a fellow employee] stopped by my machine" and "he said, 'come on and sign the card; you can always vote any way you want to' ". He said "the election would decide" and "they had to have the majority of the cards signed to have the election, but . . . whether or not we got a Union would be decided by the election" (496-497).

"They [two fellow employees] said they wanted to get enough people to sign cards to have an election out there" and "I never did hear them say" that "the Union could come in without an election" (325-326).

Mr. Conner told me "that the only purpose of the card was to get an election" (524).

"The main reason I was at the meeting was . . . to find out more information before I signed a card". Mr. McIver [the chief Union organizer] said "the purpose" was "to get enough signed cards for an election" and "he said if he had enough cards signed that night, he'd burn the road up goin' to Atlanta the next morning" to "see about a petition for an election", and "he said if he lost the election, they would pack the suitcases and go home and leave us alone" (430-431).

"They [a Union organizer and a fellow employee] told me it was for election, and the more they could get signed up, the quicker they'd have election, and the election would decide whether they'd have a union or not" (521).

"They [two fellow employees] just kept talkin', tryin' to get me to sign it. They said that the only way that the Union could get into the plant was if they won the election. So, I took their word for it" (481).

"I told him [a fellow employee] I didn't know anything about it, and I didn't care anything about

it, and I didn't wanna sign it, and if I signed it, I was not gonna vote for it. And, for a long time, I thought I was gonna get outa signin' it, but they just kept right on" (466).

"He [the chief Union organizer] told me the onliest purpose to sign a union card was to get the majority of people to sign it so we could file a petition to the Labor Board, where they could hold election" (374).

"And, he [a Union organizer] explained to me the purpose of signin' the card was to hold an election. He said that was the only purpose of it, and I believe in free elections, so I went ahead and signed the card" (501[1]).

It must be emphasized that under the *Gissel* decision itself, cards signed in such circumstances and upon such representations as these cannot constitute a basis for an order requiring bargaining with a Union as the agent of employees. This Court emphasized in *Gissel* that:

"In resolving the conflict among the circuits in favor of approving the Board's Cumberland rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clear-

[1]The testimony of the 92 witnesses can be thus summarized in a single paragraph for each and within a total compass of less than thirty printed pages. In deference, however, to the brevity here expected, the Petitioner will confine its quotation of the employees' testimony to these representative examples.

ly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

• • •

"We agree . . . that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule . . . 'The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in haec verba that the 'sole' or 'only' purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election' ".

National Labor Relations Board vs. Gissel Packing Co., 395 US 575, 606, 607, 89 S Ct 1918, 23 L Ed 2d 547, 574-575

But upon such testimony as is outlined above, can there be any doubt that "the totality of circumstances surrounding the card solicitation" of these employees "adds up to an assurance" to them that their cards

would be used "for no purpose other than to help get an election"?

Upon such testimony, can there be any doubt that the small print wording on the card was "deliberately and clearly canceled" by Union adherents "with words calculated" to cause the signers "to disregard and forget the language" of the cards?

The plain and simple and undeniable truth about the matter is that the employees whose testimony is illustrated above paid heed only to what they were told, and were either wholly unaware of the language on the card, or paid it no attention whatsoever.

> "[T]he clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality".
>
> *National Labor Relations Board vs. S. E. Nichols Company*, 380 F. 2d 438, 442-443 (2nd Cir., 1967)

Yet the Draconian edict of the Board is that the employee is rigidly bound to the legalistic conse-

quences of a phrase buried in the printed wording of the card — no matter that he did not read it and nobody read it to him — no matter that contrary representations were made to him — no matter that he voted to the contrary in the privacy of secret balloting — no matter that under oath and upon examination and cross-examination he gave testimony to the contrary — no matter that he became an active litigant in order to resist the shackle which was then being forged and which has now been locked upon him — no matter that his choice and his desire is the touchstone in the whole matter — no matter — says the Labor Board, with the Court below assenting — the phrase found in the card nevertheless triumphs over all and controls all.

It is submitted that this Court in *Gissel* never so intended.

III.

There Was No True Or Genuine "Conflict" Of Evidence As To The Invalidating Representations Made In The Procurement Of The Union Cards

It is declared however, that the testimony of all the 92 witnesses, in derogation of the cards, is of no import in court because there can be found in the record some "conflict" of evidence on the subject of representations to card signers.

Thus, it becomes of no consequence that scores of witnesses gave particularized, colorful and intrinsically believable details as to the representations made

to each of them, and the individual settings and circumstances thereof, still all such testimony goes for naught, because the Union's organizers denied that there were such representations as these employees had recounted.

The three organizers were, the Trial Examiner observed, men "who had spent many years in organizational activities" (83). For him, this seems to have exalted any broad and self-serving pronouncements on their part above the specific and affirmative and individual accounts of 92 witnesses to the contrary. Yet the Act says that the Board shall make its "findings of fact" only "upon the preponderance of the testimony". 29 USC § 160(c).

The Union representatives offered the thoroughly unnatural and unlikely assertion that they had announced and "stressed" to the employees that they "had not come to secure an election" (81). Should a reviewing Court deem itself prohibited from considering the unreality of this? Is it sensible that "mature" and "experienced" Union organizers would be stressing a negative of this sort to employees, well knowing that if their campaign was successful, it would almost certainly culminate in an election?

Moreover, it is unnecessary to reason that there is not here a genuine "conflict" of evidence. The Union organizers' opportunistic testimony that they had "stressed" to employees that their object was not "to secure an election" is thoroughly, specifically and

wholly refuted by their own writings. For example, their leaflets, introduced into evidence, stated that:

> "The big thing to remember is that the UNION COMMITTEE has told you all along that there would be an election — that the NLRB would conduct it — that it would be by SECRET BALLOT — and that it would be YOUR ELECTION".
>
> • • •
>
> "THE DATE IS SET. EVERYTHING IS IN READINESS".
>
> • • •
>
> "NOW IS YOUR BIG CHANCE. This is the time we've all been waiting for. MAKE IT COUNT!"
>
> (Exhibits on file in Court of Appeals, p. 201)
>
> (Emphasis in original)

Neither the Examiner, nor the Board, nor the Court below, makes any mention whatever of this direct written contradiction by the Union organizers of their own testimony. They point instead to "conflict" between the testimony of the Union organizers, on the one hand, and the 92 employees, on the other hand — and thus declare that the Board's resolution of the matter is unassailable (20a, 31a-32a).

Indeed, the Board does not seem to acknowledge that there is any contest on the subject, declaring instead that "there is no question" about the cards. It disposes of this key issue by a single casual remark in a footnote to its Decision and Order:

> "Accordingly, *as there is no question* that the Union had been validly designated by a majority of

the employees as their representative when the Union renewed its bargaining demand, we find . . . that the policies of the Act will be effectuated by the imposition of a bargaining order . . ." (164) (Emphasis supplied).

It is submitted that review and scrutiny of a decree such as is here at issue ought not to be avoided, nor avoidable, so cavalierly and merely upon a declaration that there is some "conflict" of testimony in some element of the structure of the ruling — and that no matter how tenuous or unimpressive or unreal such "conflict" may be, it nevertheless disarms the judiciary.

This Court long ago emphasized that a major purpose of Congress in amending the National Labor Relations Act, in 1947, was to assure that the Courts would see to it that what the Labor Board declares as proved shall indeed have been reasonably and substantially proved.

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds".
>
> *Universal Camera Corporation vs. National Labor Relations Board*, 340 US 474, 490, 71 S Ct 456, 95 L Ed 456, 468

It is submitted that the Court below failed to heed this fundamental admonition with respect to the state

of the proof in this case on the subject of the representations made to the signers of Union Cards.

IV.

There Are No Shifts In Findings Nor Alternative Grounds Of Ruling Which Would Avoid The Fatal Infirmity Of The Union Cards That The Board Has Relied Upon

The Trial Examiner, as has been noted, did not rule or recommend that the election, in which the employees voted against the Union, should be set aside because of any unfair labor practice on the part of the Company. Nor did the Board's Regional Director do so. Nor has the Board itself so ruled.

The Trial Examiner did not find or rule or recommend that any unfair labor practice on the part of the Company had rendered a free and fair re-run election either impossible or improbable. He found only that the Union achieved a card majority prior to the election and that the Company, because of its unfair labor practices, could not have entertained "a good faith doubt" of this (142[1]). Upon these two ele-

[1]This is, of course, an artificial rationalization, amounting to nothing other than an irrebuttable and legalistic presumption—for, as has already been noted; the Examiner himself finds that the Union's original assertion of majority was not only doubtful but untrue, and his finding that the Union afterwards attained a card majority is arrived at only upon intricate analysis of complicated testimony and evidence, which was certainly not available to the Company. Yet the Examiner accords to the Company a power of divination greatly superior to his own, for, says he, the Company could have had no real doubt on the matter.

ments, the Examiner held that the Company had violated Section 8(a)(5) of the Act and must therefore be ordered to bargain with the Union as the employees' representative.

Ten days after the Trial Examiner issued his Decision, this Court rendered its decision in *Gissel*. *Gissel* stated that "under the Board's current practice", to which the Board's Examiner apparently was not privy, "an employer's good faith doubt is largely irrelevant" (395 US at 594). Instead, said this Court, "the key to the issuance of a bargaining order is the commission of serious unfair labor practices" (395 US at 594), "which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside" (395 US at 610[1]).

Adjusting to this explication in *Gissel*, the Board shifted from the course taken by its Examiner at the trial and in his Decision, and readily phrased a new "finding", albeit in footnote, that the "holding of a fair and coercion free rerun election" was "improbable if not impossible" (164).

Then, superimposing upon this the thoroughly unjustified assertion that "there is no question that the Union had been validly designated by a majority of the employees as their representative" through the signing of the cards, the Board brings forth an ex-

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[1]It will again be remembered, however, that here the election was not set aside because of any unfair labor practices.

pediently retailored bargaining order — but one still based and founded upon the cards.

As an alternative to the infirmities of such process, the Court below declares that "the extensiveness of the unfair labor practices here" supports a bargaining order "even if the Union never possessed a valid card majority" (14a). This pronouncement, however, seems clearly beyond the Court's proper reach.

The charges and complaints in the case asserted no such claim. The trial of the case proceeded upon no such theory. The Trial Examiner made no such ruling or recommendation. Nor does the Board appear to have made any such ruling — for, as has been noted, the Board says that "accordingly, as there is no question that the Union had been validly designated by a majority of the employees as their representative . . . the policies of the Act will be effectuated by the imposition of a bargaining order" (164).

Indeed, the Court below expressly recognized that the Board had placed its reliance on the Union's having attained a valid card majority. The Court says that "relying on what it found to be a card majority for the Union on March 18, the Board ordered Stevens to recognize and bargain with the Union" (5a[1]).

---

[1]In a Complaint issued against the Company as recently as March 2, 1970, the Board, reiterating its contention that the Company is under a duty to bargain with the Union, still bases such contention solely upon the proposition that the employees at this plant have "designated and selected the Union as their representative" (Board Case No. 10-CA-8108).

The Court says that it is "under *Gissel*" that the Company by reason of its "pervasive" unfair labor practices may be ordered to bargain though "the Union never possessed a valid card majority" (12). As authority for such pronouncement the Court points to no decision of this Court save *Gissel* (14a).

Yet *Gissel* made no such ruling. In all the four cases consolidated under *Gissel*, card majorities were claimed and relied upon. And in *Gissel*, this Court expressly said:

> "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior". (395 US at 614)

Thus, the Court below has misread *Gissel*. And whether it looks to the charges, the complaints, the trial of the case, the Trial Examiner's Decision, the Board's Decision and Order, or to *Gissel* — it can find no support for its pronouncement that the issue of the validity of the card majority may be by-passed in this case.

As to the "pervasive" and "egregious" nature of the unfair labor practices asserted against the Company, the allegedly coercive and disputed remarks were claimed to have been made by supervisors to some eight separate employees. The employees discharged were three, over a period of two months among a total of more than three hundred employees, and the Company presented full and detailed evidence that one of these was discharged for deliberately and repeatedly ignoring his supervisor's instructions — another for poor performance, including sleeping on the job — and the third for threatening a fellow employee.

On these matters there was significant conflict of testimony. Yet it should be noted, even in this Court, that on all of such conflict, uniformly and without exception the Board and its Examiner found that truth resided always in the witnesses for the Union and the Board and never in the witnesses for the Company[1].

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[1]So it was in the original and basic case involving contest between the Union and the Board, on the one hand, and this Company, on the other, which is invariably cited by the Union and the Board as an example of "background" unfavorable to this Company. There, some 443 witnesses testified on a multitude of disputed and material factual issues. The Board conducted hearings over a period of months at various locations. Most of the witnesses testified in behalf of the Company. They included not only supervisors and representatives of management, but rank and file employees and persons unconnected with the Company as well.

Yet, not once upon any conflict as to disputed facts, did the

V.

Having Demonstrated, By Secret Ballot And Sworn Testimony And Intervention As Active Litigants, That They Do Not Want The Union As Their Representative, The Employees' Desire Should Be Heeded—And Interpretation Of This Court's Decision In *Gissel* As Requiring An Opposite Result Should Not Be Permitted

The Court below apparently accepts it as clearly established that the employees do not desire the Union as their representative. The Court says that "we realize that . . . the Union has not been able to retain its majority status" (23a). The Court says, however, that this is "a result of the employer unfair labor practices" (23a). The Board likewise declares "that the unfair labor practices . . . in fact did dissipate the Union's majority" (164).

These are, however, pronouncements and presumptions on the part of the Board and the Court. There was no evidence that any employees actually turned away from the Union because of any unfair labor prac-

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Board ever credit a witness favorable to the Company as against a Union or Board witness—and not once did the Board ever discredit a Union or Board witness as against a Company witness.

On all this wide and intricate panorama of factual litigation, the Board's view was that truth was always the exclusive monopoly of witnesses on one side, and was never to be found elsewhere.

tices on the part of the Company. Indeed, there was no evidence that employees of a number sufficient to affect the outcome of the matter even knew of the discharge of the three employees referred to above or the alleged coercive statements by supervisors to the eight separate employees. It is also to be remembered that it was after the occurrences of these alleged unfair labor practices and immediately preceding the election that the "sign-up" of Union cards reached its highest point (140).

On the other hand, at the trial, the Company sought to take on the burden of showing, and was denied the opportunity of showing, that the alleged occurrence of unfair labor practices actually and in truth had no bearing on the Union's attaining or maintaining or losing majority status (Tr. 2807). The Trial Examiner refused to permit the Company to question employee witnesses on this central issue.

The Board, with the lower Court's acquiescence, assumes the answer to this key question and makes it a matter of irrebuttable presumption by barring all proof to the contrary.

Similar presumption and refusal to consider contrary proof is continuously involved in the Board's and the Court's references to the Union's having had "majority status" and in the Court's references to the employees' "subsequent recantation" (22a, 23a). It is only by disregarding the testimony of the 92 witnesses that the Board is able to declare that the Union ever had

any true "majority status". It is only by ignoring what they said under oath that the Court is able to refer either to their election vote or their testimony as a "recantation".

What they testified in open hearing, and under examination and cross-examination, was that they never did want the Union as their representative unless it won a majority vote in a secret ballot election—and that they signed cards only because it was represented to them that recognition of the Union as bargaining agent could be required only upon the Union's winning a majority vote in such an election. This being their position at the time of signing the cards, the Union never in truth had in such cards a "majority status", and neither the election result nor the testimony of the 92 witnesses was a "recantation" of anything.

Still another basic misconception permeates the decision of the Court below. The Court refers to the 117 individual intervenors as "employees who now intervene on behalf of the Company" (22a).

This fundamentally overlooks the rights which are here at stake. Indeed, it loses sight of the central thrust of the law which is here being administered.

Employees are entitled to be represented by a Union if they so choose—and are equally entitled not to be represented by a Union if they do not so choose. 29 USC §157. It is a violation of the National Labor Relations Act to impose upon them a Union representation which they do not want. It is a violation of that Act for

bargaining negotiations to be conducted between their employer and a Union which they do not in truth desire as their representative.

At the trial of this case and in their arguments to the Board and the Court, these intervenor employees urged that it had "apparently" been "forgotten that the matter here presented for resolution is that which will best protect *employee* rights, not the determination of who will triumph in a litigated contest between the Company and the Union. The free choice of those workers of the Statesboro Plant who rejected organization must be implemented whether or not that implementation serves the best interests of either the employer or the Union" (Brief of Mildred G. Bailey, et al in Court of Appeals, p. 27) (Emphasis in original).

> "The rights involved are those of the employees . . . The right of employees to a choice and a choice through the secret ballot should not be lightly disregarded . . . Anything less disparages the rights accorded employees under §7 of the Act and may visit the sins of the employer on the employees. The struggle is between the employer and the union but the right to select is that of the employees".
>
> *National Labor Relations Board vs. Lake Butler Apparel Company,* 392 F. 2d 76, 82 (5th Cir., 1968)

Yet, as has been noted, the lower Court thinks of the efforts of the intervening employees in this case as being "on behalf of the Company". More accurate-

ly, the basic strength of the Company's opposition here consists of the simple principle that the choice of the employees is all-controlling — and that since they have demonstrated that they do not desire to be represented by the Union, the Company should not be required to deal with this Union as their representative.

These employees have so demonstrated, not once but twice — first by secret ballot and, secondly, by sworn testimony in open hearing. And on the second occasion they explained, firmly, positively and emphatically, that their signing of cards in an apparently opposite direction was conditioned upon representations that the cards would bring on an election, and that the election — not the cards — would determine whether the Union would be the representative of the employees at this plant.

After all, it is a remarkable non sequitur to say that the way to punish an employer for wrongdoing, or to "remedy" his wrongdoing, is to impose upon his employees a Union representation which they do not want — and which they have proved they do not want both by secret ballot and by sworn testimony. Through such quixotic process, the Labor Board transforms itself from guardian of employee choice to dictator of employee choice.

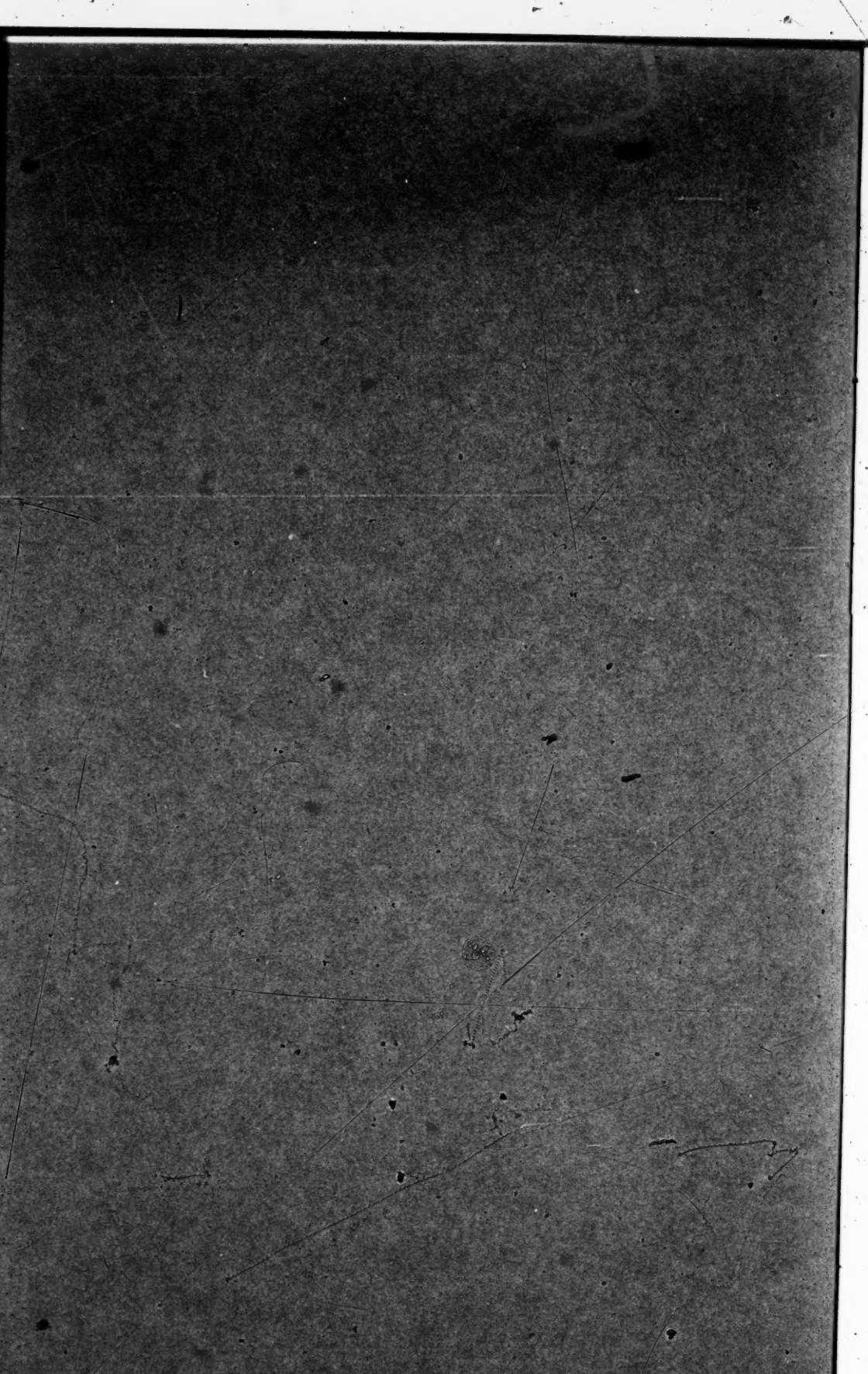
It is submitted that this Court should make clear that it has not in *Gissel,* nor in any other decision, so required or so authorized.

CONCLUSION

Upon all of the foregoing, the Petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner



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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 28,631

J. P. STEVENS & CO., INC., GULISTAN DIVISION,
Petitioner-Cross-Respondent

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner

and

MILDRED G. BAILEY, ET AL, EMPLOYEES,
Intervenors

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor

NO. 29,037

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petitions For Review And Cross Application For Enforcement Of An Order Of The National Labor Relations Board

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(March 22, 1971)

Before THORNBERRY, GOLDBERG, and AINSWORTH, Circuit Judges.

GOLDBERG, Circuit Judge: J. P. Stevens & Company, Inc., unchastened by and impervious to judicial homilies, once again seeks liberation from a National Labor Relations Board order. Taking the opposite position, the Textile Workers Union of America, AFL-CIO, entreats us to broaden the Board's order to combat Stevens' known predisposition to violate the law. Rejecting both of these positions, we enforce the Board's order in full.

I.

The Textile Workers Union (hereinafter referred to as the Union) began its organizing campaign at J. P. Stevens' Statesboro, Georgia, plant in January of 1968. The Union made intensive efforts to secure authorization cards from the employees, efforts which met with determined resistance on the part of Stevens. On February 17, the Union wrote Stevens a letter in which it claimed that it was the representative of the majority of employees in a production and maintenance unit; demanded recognition by Stevens as exclusive representative of the employees in that unit; and stressed that if the Company had any doubts of the majority, the Union would submit the authorization cards in its possession to a disinterested third party. Stevens replied to the Union letter by stating that it had indications that a majority of its employees did not want union representation; that it did not wish a

third party to check cards; and that it assumed that the Union would refer the matter to the Labor Board for disposition.

Thereafter, on February 21, the Union filed an election petition with the Board, and an election was scheduled for April 22 and 23, 1968. Prior to that election, on March 18, and again on April 20, the Union affirmed that its recognitional demand was a continuing one and invited Stevens to forego the election proceedings.[1] Stevens' officials declined these invitations.

On April 22 and 23, 1968, the Board conducted an election at the Stevens plant. The Union lost by a vote of 198 to 110 and filed timely objections. In response the Board's Regional Director, noting that "it is unnecessary to consider the [Union's] remaining objections," set the election aside because the Company had failed to submit an employee eligibility list as mandated by *Excelsior*.[2] The Union then filed unfair labor practice charges before the Board.[3]

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[1]There is some indication that the Company disputes the Board's finding that the Union renewed its recognitional demand on these two dates. The Board's conclusion, however, is supported by substantial evidence.

[2]In Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966), the Board held that an election may be set aside if a company refuses to provide to a petitioning union an address list of all company employees. The Supreme Court recently upheld the validity of the *Excelsior* rule in NLRB v. Wyman-Gordon Co., 1969, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709.

[3]It is now clear that even though a union has requested a Board election, it is not precluded from obtaining recognition, following its election defeat, through the unfair labor practice procedure. NLRB v. Gissel Packing Co., 1969, 395 U.S. 575, 615 n. 34, 89 S.Ct. 1918, 23 L.Ed.2d 547, citing with approval Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964).

In its unfair labor practice charges the Union alleged (1) that Stevens' anti-union conduct during February and March interfered with, restrained, and coerced company employees in the exercise of their section 7 rights in violation of section 8(a)(1) of the National Labor Relations Act;[4] (2) that Stevens' discharges of three employees and its refusal to hire an applicant for employment, were in violation of section 8(a)(3) of the Act;[5] and (3) that Stevens' refusal to bargain with the Union following the recognitional demands was in bad faith and in violation of section 8(a)(5) of the Act.[6] These allegations were

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[4]Section 8(a)(1), 29 U.S.C.A. § 158(a)(1), provides:

> "(a) It shall be an unfair labor practice for an employer —
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

Those section 7 rights guaranteed by section 8(a)(1) are set forth in 29 U.S.C.A. § 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[5]Section 8(a)(3), 29 U.S.C.A. § 158(a)(3), provides in relevant part as follows:

> "(a) It shall be an unfair labor practice for an employer —
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

[6]Section 8(a)(5), 29 U.S.C.A. § 158(a)(5), provides:

> "(a) It shall be an unfair labor practice for an employer —
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

denied by Stevens and by 117 employees of Stevens who intervened in the proceedings on behalf of the Company. Following a hearing the Board, largely adopting the Trial Examiner's conclusions, found that the Company had violated sections 8(a)(1) and 8(a)(3) and ordered the traditional remedies.[7] Moreover, the Board found that Stevens' unfair labor practices had made a fair rerun election impossible. Relying on what it found to be a card majority for the Union on March 18, the Board ordered Stevens to recognize and bargain with the Union. In No. 28,631 Stevens and the intervening employees ask us to set aside this Board order in all respects, while in No. 29,037 the Union asks us to compel the Board to fashion a more far-reaching remedy. The Board, in both actions, cross petitions for enforcement of its order as entered.

II.

Stevens first claims that the record is devoid of substantial evidence in support of the Board's finding of section 8(a)(1) and section 8(a)(3) violations. We

[7] The Board ordered Stevens (1) to cease and desist from the unfair labor practices found; (2) to make each employee or employee applicant whole for any loss of earnings resulting from discriminatory actions; (3) to offer full and immediate reinstatement to the three employees discriminatorily discharged; (4) to offer employment to the employee applicant whom Stevens discriminatorily refused to hire; (5) to grant the Union access to bulletin boards for a one-year period; (6) to post appropriate notices, mail a copy to each employee, and have a company official read the notice to the employees. These remedies are quite similar to those ordered in an earlier Stevens case, J. P. Stevens & Co. v. NLRB, 5 Cir. 1969, 417 F.2d 533.

disagree. The record reveals, and the Board found, that Stevens engaged in an extensive campaign of "classic, albeit crude, unlawful labor practices" to defeat the Union.[8] During the organizational campaign waged by the Union in February and March there were numerous instances of Company misconduct violative of section 8(a)(1). Supervisory personnel threatened that a Union victory would result in a reduction of work, extensive discharges, and even the closing of the plant. *See NLRB v. Gissel Packing Co., supra,* 395 U.S. at 617; *Textile Workers Union v. Darlington Mfg. Co.,* 1965, 380 U.S. 263, 274 n.20, 85 S. Ct. 994, 13 L.Ed.2d 827; *NLRB v. Varo, Inc.,* 5 Cir. 1970, 425 F.2d 293; *NLRB v. Dowell Div. of Dow Chemical Co.,* 5 Cir. 1969, 420 F.2d 480; *NLRB v. Neuhoff Bros. Packers, Inc.,* 5 Cir. 1967, 375 F.2d 372. Company officials engaged in blatant surveillance of Union activities. *See NLRB v. Southland Paint Co.,* 5 Cir. 1968, 394 F.2d 717, 719-20; *Hendrix Mfg. Co. v. NLRB,* 5 Cir. 1963, 321 F.2d 100. Stevens' supervisors interrogated employees with regard to Union activities under circumstances that tended to be coercive and intimidating, *see NLRB v. Varo, Inc., supra,* 425 F.2d at 297-98; *Ridgewood Management Co. v. NLRB,* 5 Cir. 1969, 410 F.2d 738, *cert. denied,* 396 U.S. 833, and made promises of benefits calculated to undermine Union strength, *see NLRB v. Varo, Inc., supra,* 425 F.2d at 298-99. During a critical juncture in the

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[8]This language is borrowed from Chief Judge Brown's characterization of Stevens' conduct in an earlier case, J. P. Stevens & Co. v. NLRB, supra, 417 F.2d at 536.

Union campaign the Company granted certain benefits which the Board found were designed to destroy Union support. *See NLRB v. Exchange Parts Co.*, 1964, 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435; *Russell-Newman Mfg. Co. v. NLRB*, 5 Cir. 1969, 406 F.2d 1280, 1283. Finally, when the Union organizing effort began, the Company breathed new life into a long dormant rule prohibiting all solicitation at the plant, even on nonworking time. *See Republic Aviation Corp. v. NLRB*, 1945, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372; *NLRB v. Varo, Inc, supra*, 425 F.2d at 297; *NLRB v. K-D Mfg. Co.*, 5 Cir. 1969, 419 F.2d 467; *Ridgewood Management Co. v. NLRB*, *supra*, 410 F.2d at 740. Equally supported by substantial evidence are findings of the Board that Stevens violated section 8(a)(3) both before and after the representation election by discriminatorily discharging employees Connor, Akins, and Cribbs, all active Union supporters, and by discriminatorily refusing to hire applicant Bradley, a relative of an active Union adherent. *See Phelps Dodge Corp. v. NLRB*, 1941, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271; *Reading & Bates, Inc. v. NLRB*, 5 Cir. 1968, 403 F.2d 9; *NLRB v. Neuhoff Bros. Packers, Inc., supra; Sarkes Tarzian, Inc. v. NLRB*, 7 Cir. 1967, 374 F.2d 734, 738, *cert. denied*, 389 U.S. 849; *NLRB v. Albritton Eng'r. Corp.*, 5 Cir. 1965, 340 F.2d 281, *cert. denied*, 382 U.S. 815.

We therefore hold that there is substantial evidence in the record as a whole to support the Board's finding of section 8(a)(1) and section 8(a)(3) violations, *see*

Universal Camera Corp. v. NLRB, 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, and we enforce those portions of its order designed to eradicate the violations through what have been termed "traditional remedies."[9]

III.

The Board, however, went beyond its traditional remedies and ordered Stevens to bargain with the Union. Recognizing that a rerun election is "the preferred method for the determination of whether employees shall be organized collectively," *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 603, the Board here concluded that a bargaining order was necessary to effectuate the purposes of the Act.

In determining whether to enforce the Board's bargaining order we must be guided by the Supreme Court's decision in *Gissel*. That decision instructs us that where an employer has committed unfair labor practices a bargaining order, rather than a Board-conducted election, may issue under certain special circumstances. Balancing the sometimes conflicting goals of deterring employer misbehavior and effectuating employee free choice, the Court found two circumstances which would justify the bargaining order remedy. First, even where a union has never demonstrated majority support in an appropriate unit, the Board may issue a bargaining order where the employer unfair labor practices are so "outrageous" and

[9]NLRB v. Gissel Packing Co., supra, 395 U.S. at 614; see note 4 supra.

"pervasive" that their " 'coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.' " *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 613-14, quoting *NLRB v. S.S. Logan Packing Co.*, 4 Cir. 1967, 386 F.2d 562, 570. Second, where the employer unfair labor practices are less pervasive, the Board, to protect employee free choice, must determine not only that a fair election is improbable but also "that at one point the union had a majority." *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 614. Where the unfair labor practices have only a "minimal impact on the election machinery," a bargaining order is inappropriate. *NLRB v. Gissel Packing Co., supra,* 395 U.S. 615.[10]

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[10]In what has been termed its "famous footnote eighteen", Christensen & Christensen, *Gissel Packing* and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA, 37 U. Chi. L. Rev. 411, 423 (1970), the Supreme Court in *Gissel* was careful to emphasize that it was not deciding "whether a bargaining order is ever appropriate in cases where there is no interference with the election process" by independent unfair labor practices. 395 U.S. at 595, 601 n.18. In short, *Gissel* simply constituted an approval of Board-compelled bargaining in instances where recourse to a ballot is made impossible by employer misconduct. It did not delineate the precise scope of the duty to bargain imposed by section 8(a) (5), or the limits of the Board's power to enforce that duty through bargaining orders, when an employer is confronted by an authorization card majority and does not commit independent unfair labor practices. Christensen & Christensen, supra, at 424; see NLRB v. American Cable Systems, Inc., 5 Cir. 1969, 414 F.2d 661, 668 n.5. The logic of the opinion, therefore, views the bargaining order in situations such as the instant case not as an enforcement of a duty to bargain, but as a remedy for employer coercive practices.

Nevertheless, the Board here has ordered Stevens to bargain not only as a remedy for violations of Section 8(a) (1) and section 8(a) (3) but also as a remedy for a violation of section 8(a) (5). The Board's reasoning is sanctioned by *Gissel*, for the Court there

The Board found in the instant case not only that a bargaining order was required to combat Stevens' "extensive and egregious unfair labor practices", but also that reliance on the authorization cards would better effectuate employee free choice than a rerun election[11] in the coercive atmosphere which obtained at the Stevens plant:

> "The record reveals that upon learning of the presence of the Union, Respondent resorted to a campaign of extensive and egregious unfair labor practices in its efforts to thwart the Union's organi-

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approved current Board practice which holds that when an employer's unfair labor practices have destroyed the accuracy of the election process as a barometer of employee opinion, the employer's subsequent refusal to negotiate becomes a section 8(a) (5) violation, 395 U.S. at 594.

Since we find that the bargaining order here was justified under both special circumstances outlined in *Gissel*, we must also approve the Board's conclusion that Stevens violated section 8(a) (5). But such post-decision labeling adds little to what we deem the proper analysis of this case: whether, as a remedy for Stevens' violations of section 8(a) (1) and section 8(a) (3), a bargaining order is preferable to a Board-conducted election. See Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 247-52 (1969); cf. NLRB v. Wylie Mfg. Co., 10 Cir. 1969, 417 F.2d 192, 196, cert. denied, 397 U.S. 913.

[11]Stevens and the intervening employees argue that a bargaining order is inappropriate since the election which the Union lost was never set aside because of any unfair labor practices. The Board's Regional Director set aside the election because of Stevens' refusal to supply an *Excelsior* list and thus found it "unnecessary to consider" the Union's other objections, including the allegation that unfair labor practices made the election invalid. This disposition had a practical basis, for it vitiated the necessity for a long evidentiary hearing. It did not preclude the Board from subsequently finding, as it did, that

> "[t]he timing of Respondent's [Stevens] unfair labor practices, commencing almost immediately after the organizational drive began and persisting until after the time of the election, persuades us that the unfair labor practices were

zational drive. The timing of Respondent's unfair labor practices, commencing almost immediately after the organizational drive began and persisting until after the time of the election, persuades us that the unfair labor practices were calculated to, and in fact did dissipate the majority which the Union acquired between February 18 and March 18, 1968. In these circumstances we believe that a bargaining order is required to repair the effects of such unfair labor practices. For this reason, and also because Respondent's unfair labor practices were of such a nature as to make the erasure of their effects by traditional remedies and holding of a fair and coercion free rerun election improbable if not impossible, we are of the opinion and find that, on balance the rights of the employees and

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calculated to, and in fact did dissipate the majority which the Union acquired between February 18 and March 18, 1968."

Stevens' and the intervening employees' contentions are, therefore, without merit.

Moreover, a finding that an election has been set aside because of employer unfair labor practices may not always be a prerequisite to the issuance of a bargaining order. While *Gissel* requires that the Board determine that employer unfair labor practices have made a fair election improbable, that requisite finding looks predominantly to the future. The fact that an election has been set aside for reasons other than pre-election unfair labor practices — for example, for failure to supply the *Excelsior* list — does not necessarily mean that a fair rerun election may be held. Post-election unfair labor practices may also destroy laboratory conditions. If so, the Board must then determine whether a bargaining order, despite an absence of majority support, is more appropriate than a rerun election under prevailing coercive conditions. See NLRB v. Drives, Inc., 7 Cir. 1971, —— F.2d ——; cf. Independent, Inc. v. NLRB, 5 Cir. 1969, 406 F.2d 203, 207-08.

the policies of the act would better be effectuated by reliance on the employee sentiment as expressed in the authorization cards. Accordingly, as there is no question that the Union had been validly designated by a majority of the employees as their representative when the Union renewed its bargaining demand, we find that by refusing to honor the Union's bargaining demand and by engaging in the numerous unfair labor practices found by the Trial Examiner, Respondent violated Section 8(a)(5) and (1) of the Act, and that the policies of the Act will be effectuated by the imposition of a bargaining order to remedy the Respondent's refusal to bargain, as well as its other unfair labor practices herein found. *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, *Sinclair Company v. N.L.R.B.*, 395 U.S. 575."

A.

In agreement with the Board we think that the present proceedings constitute one of those "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices which, under *Gissel*, justify the issuance of a bargaining order despite the absence at one point of a Union-demonstrated majority. Stevens' intransigent recidivism is patent and overt. Denominating our case as *Stevens VI* in deference to historical accuracy, we note that neither the passage of time nor the admonishments of judicial tribunals have caused the Company to alter its now all too familiar

pursuance of full-scale war against unionization. Judge Brown's characterization in *Stevens V* is equally apt here:

> "Stevens has been engaged in a massive multistate campaign to prevent unionization of its Southern plants. This campaign has involved numerous flagrant unfair labor practices including coercive interrogation, surveillance, threat of plant closings, and economic reprisals for Union activity. Moreover, the threats have been made good by extensive discriminatory discharges. As a result of these practices, several unfair charges have been brought before the Labor Board (see note 7 *supra*) and, except for slight variations, the orders of the Board have been enforced by two other Circuit Courts of Appeal in *Stevens I, II and III and IV* (*see note* 1 *supra*). As the Fourth Circuit said in assessing the Company's conduct in *Stevens III and IV*, "the Board property took into consideration the unfair labor practices that *Stevens I and II*, disclosed; and we, in turn, cannot ignore this evidence. Maphis Chapman Corp. v. NLRB, 368 F. 2d 298, 303 (4th Cir. 1966)". *Stevens III and IV* at 1019 of 406 F.2d. Nor can we, in our subsequent turn, ignore the unfair labor practices disclosed in *Stevens III and IV*. To these we add the incidents and violations found by the Board to have occurred in the Georgia plants. Thus we assay the order in this atmosphere of persistent, long continued, flagrant violations occurring after and in spite of re-

peated declarations of illegality by Board and reviewing Courts."

J. P. Stevens & Co. v. NLRB, supra, 417 F.2d at 537.

In such an atmosphere the Board was warranted in finding that even if the Union never possessed a valid card majority, a bargaining order was appropriate to combat Stevens' anti-union conduct. The extensiveness of the unfair labor practices here would clearly support a finding that "their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *NLRB v. S.S. Logan Packing Co., supra,* 386 F.2d at 570, quoted with approval in *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 614. Such practices, particularly the circumstances of the dismissals of three leading Union adherents and the campaign of blatant surveillance, interrogation, and threats are sufficient to bring this case within the pattern of other cases which have been deemed "exceptional." *E.g., NLRB v. Gissel Packing Co., supra,* 395 U.S. at 579, aff'g *NLRB v. Sinclair Co.,* 1 Cir. 1968, 397 F.2d 157; *G.P.D., Inc. v. NLRB,* 6 Cir. 1970, 430 F.2d 963; *NLRB v. Wylie Mfg. Co., supra; see NLRB v. Lou De Young's Market Basket, Inc.,* 6 Cir. 1970, 430 F.2d 912.

B.

Moreover, we hold that in any event the bargaining order here was justified because the Union did at

one point demonstrate a card majority. We discussed this second classification of cases in *NLRB v. American Cable Systems, Inc., supra,* 414 F.2d at 668-69:

> "Under the *Gissel* holding a bargaining order may issue where: (a) the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not 'outrageous' and 'pervasive' enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) 'the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight'; and (d) employee sentiment can best be protected in the particular case by a bargaining order."

Stevens and the intervening employees argue, however, that the Union never had a valid authorization card majority. While admitting that as of March 18 the Union did possess enough employee signatures to constitute a numerical majority.[12] Stevens and the intervenors claim that sufficient numbers of these signatures were obtained by coercion or misrepresentation to vitiate the ostensible majority. In support of

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[12]The Board adopted the Trial Examiner's finding that while in February, at the time of the first recognitional demand, the Union did not possess a card majority, it had established majority support by March. Thus, on March 18, 1968, the Examiner found that the Union had secured 224 valid authorization cards from a unit consisting of 343 employees. On April 20, 1968, when an additional recognitional demand was made, the Examiner found that the Union had secured 222 valid authorization cards from a unit consisting of 326 employees.

their contentions the Company and the individual intervenors append excerpts from the testimony of 92 Stevens' employees which, they claim, demonstrate conclusively the presence of misrepresentation and coercion.

The conflicting testimony in this case demonstrates that authorization cards are often a hazardous basis upon which to ground a union majority. Nevertheless, where employer unfair labor practices have undermined the reliability of the preferred method for determining employee sentiment, a Board-conducted election, reliance upon authorization cards may be necessary. In *Gissel* the Court recognized this fact:

> "The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective — perhaps the only — way of assuring employee choice." *NLRB v. Gissel Packing Co., supra,* 395 U.S. at 601.

Where courts are forced to rely on authorization cards, of course, they must not be oblivious to the circumstances under which the cards were solicited. But where the cards are, as here, unambiguous on their face,[13] the circumstances must show clearly and con-

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[13]Each card read as follows:

> "Textile Workers Union of America
> Affiliate of the AFL-CIO and CLC
>
> I hereby join with my fellow workers at the .... mill in organizing a union to better our conditions of life and secure economic justice, as is my right under the laws of the United States. To this end I declare that the

vincingly that they were secured through coercion or misrepresentation before they may be disregarded. *See Retail Store Employees Union Local 880 v. NLRB*, D.C. Cir. 1969, 419 F.2d 329, 334. The Court in *Gissel* phrased the test as follows:

> "In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him then telling him that the card will probably be used first

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Textile Workers Union of America, AFL-CIO and CLC, shall be any representative in collective bargaining over wages, hours and all other conditions of employment. I make this pledge of my own free will in the conviction that the united action of all workers through union of their own choosing is the way to achieve the liberty of the individual for the benefit of all.

In addition, these cards had a place for the employee's signature, the date, job description information, and the employee's address.

A second type of authorization card distributed by the Union read as follows:

Textile Workers Union of America
Affiliate of the AFL-CIO and CLC

I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

In addition these cards had spaces for the employee's signature, job description, date, and employee's address.

to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else. In addition to approving the use of cards, of course, Congress has expressly authorized reliance on employee signatures alone in other areas of labor relations even where criminal sanctions hang in the balance, and we should not act hastily in disregarding congressional judgments that employeees can be counted on to take responsibility for their acts.

"We agree, however, with the Board's own warnings in *Levi Strauss*, 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)

(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." 395 U.S. at 606-08.

The litany of testimony adduced by the Company, the individual intervenors, and the Board convinces us of the merit of refusing to rely on "subjective motivations" and of viewing with a critical eye post-solicitation statements contrary to the language of the cards. *See also NLRB v. American Art Indus., Inc.*, 5 Cir. 1969, 415 F.2d 1223, *cert. denied*, 397 U.S. 990; *NLRB v. American Cable Systems, Inc., supra*, 414 F.2d at 665-67. Most of the testimony of the 92 employees proferred by the Company and the intervenors is hazy, imprecise, and contradicted by the testimony not only of Union solicitors but also of fellow employees.[14] *See Amalgamated Clothing Workers of America v. NLRB*, D.C. Cir. 1969, 420 F.2d 1296, 1301-02; *Retail Store Employees Union Local 880 v. NLRB, supra*, 419 F.2d at 335. Other testimony, while perhaps

[14]For example, many of these cards were solicited at Union meetings held on February 12 and February 15, 1968. The Trial Examiner, relying on the testimony of Union Representative McIver and numerous employees, found that at those meetings McIver told the employees that the Union would first ask for recognition and that, only afterwards, if the Company refused to grant recognition, would the cards be used for an election. Much of the opposition testimony proves no more than that an election was mentioned at the meetings. But as the Supreme Court clearly held in *Gissel*, mere mention that the cards may be used to secure an election is not sufficient to vitiate their efficacy. Such cards can be disregarded only where Union organizers solicit them on the explicit or indirectly expressed representation that they will use such cards *only* for an election. NLRB v. Gissel Packing Co., supra, 395 U.S. at 607-08 & n. 27.

producing a sharper conflict,[15] simply raises credibility choices which are within the province of the Trial Examiner and the Board to resolve. *NLRB v. American Art Indus., Inc., supra,* 415 F.2d at 1227. We therefore hold that the findings of the Board are supported by substantial evidence and conclude that as of March 18 the Union possessed a valid authorization card majority.

The fact that the Union held a valid authorization card majority on March 18, however, is not sufficient in itself to warrant the issuance of a bargaining order. In *Gissel* the Supreme Court noted that even if an employer committed serious unfair labor practices which might have dissipated a Union majority, the Board, in determining the propriety of a bargaining order, must make a contemporaneous judgement.

> "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order, then such an order shall issue." 395 U.S. at 614-15. *See also NLRB v. American Cable Systems, Inc.,* 5 Cir. 1970, 427 F.2d 446.

In short, since a Board-conducted election is the preferred mode of determining employee sentiment, the

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[15]Most of this testimony concerns those cards solicited by Union organizers on the access road outside the plant and those cards solicited by employee adherents of the Union.

Board should approach the bargaining order remedy with some caution. The touchstone is the protection of employee free choice. If, at the time of the Board proceedings, the conditions at the plant are such that a fair election is probable, the Board should not issue a bargaining order. But if the Board determines that the effects of the employer unfair labor pratices make a fair election improbable, it should order the employer to bargain on the basis of employee sentiment expressed in the authorization cards. As we stated the matter in *American Cable*:

> "*Gissel* does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity — a present view, albeit with an historical prospective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election. On the other hand, if the employer's 1965 violations of § 8(a) (1) and (3) have a 1970 existence, *Gissel* commands the issuance of a bargaining order . . . ." *NLRB v. American Cable Systems, Inc., supra*, 427 F.2d at 449.

The Company and the individual intervenors here argue that since 117 Stevens' employees now intervene and urge an election, employee free choice would be thwarted by ordering Stevens to bargain with a now rejected Union. The Board, on the other hand, contends that this employee recantation is simply evidence of the continuing presence of the polluting

effects of Stevens' unfair labor practices. We agree with the Board.

Many of those employees who now intervene on behalf of the Company were active union adherents during the organizational drive. We think that the Board could find in its expert judgment that their subsequent recantation was simply a product of Stevens' unlawful conduct. The anti-union history of Stevens and the extensive unfair labor practices chronicled in this case provide substantial evidence for such a conclusion. It would be a hardy employee indeed who would risk discharge or a plant shutdown by actively and overtly supporting the Union. Since the 1968 unfair labor practices continued to have a 1969 vitality, the time the Board entered its order, the Board was justified in determining that a fair election was improbable and that a bargaining order was required.[16] *See Ace-Alkire*

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[16]The revelant time-period for making such a determination is when the matter is before the Board for remedial action — October, 1969, in the instant case. If a bargaining order is deemed appropriate at that time, the court should not reconsider the matter as of the date it is before it for enforcement. Thus, in NLRB v. L. B. Foster Co., 9 Cir. 1969, 418 F.2d 1, 4, cert. denied, 397 U.S. 990, the court stated:

> "We do not think that these facts permit us to refuse to enforce the Board's order. The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. Suppose that the Board does so, and again finds against the employer. There can then be a petition to this court, a decision by it, and a petition

Freight Lines, Inc. v. NLRB, 8 Cir. 1970, 431 F.2d 280, 284; *G.P.D., Inc. v. NLRB, supra; NLRB v. Lou De Young's Market Basket, Inc., supra*, 430 F.2d at 915; *NLRB v. Wylie Mfg. Co., supra*, 417 F.2d at 195-96.

We realize that as a result of the employer unfair labor practices the Union has not been able to retain its majority status. The Board, therefore, is in one sense imposing a minority Union on the majority of Stevens' employees. The Supreme Court in *Gissel*, however, clearly addressed this issue and resolved it in favor of the Board:

"Remaining before us is the propriety of a bargaining order as a remedy for a § 8 (a) (5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bar-

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for certiorari to the Supreme Court. By that time there will almost surely be another new set of facts. When is the process to stop?"

See also NLRB v. South Bay Daily Breeze, 9 Cir. 1969, 415 F.2d 360, 367, cert. denied, 397 U.S. 915.

Nothing we said in NLRB v. American Cable Systems, Inc., supra, 427 F.2d 446, is inconsistent with this proposition. In that case there was a remand to the Board in light of *Gissel*. We simply held that, at the time the Board reconsidered the propriety of a bargaining order on remand under *Gissel* standards, it was required to consider the then existing situation at the company to determine whether a fair election was still improbable. The *Foster* case was specifically distingiushed on this ground. 427 F.2d at 448.

gaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB v. Katz*, 369 U.S. 736, 748 n. 16, 8 L Ed 2d 230, 239, 82 S Ct 1107 (1962); *NLRB v. Lorillard Co.* 314 US 512, 86 L Ed 380, 62 S Ct 397 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co. v. NLRB*, 321 US 702, 88 L Ed 1020, 64 S Ct 817 (1944). We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Frank Bros., supra*, at 704, 88 L Ed at 1023, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires.

"The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees during plant time and to give the union access to employees during working time at the

plant, or it can seek a court injunctive order under § 10(j) (29 USC § 160(j)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' § 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage[32] as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.

"There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make

appropriate changed bargaining relationships." *Frank Bros., supra,* at 705-706, 88 L Ed at 1023."

395 U.S. at 610-13 (footnotes omitted).

Still it might be argued that many of the recantations were not the product of Stevens' unlawful conduct. There may be employees who, uncoerced by the Company's unfair labor practices, now reject the Union. Employee free choice for them would best be served by an election. But the Board's evaluation of the propriety of a bargaining order cannot be based on employee motivations, determined individual by individual. We cannot require the Board to engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation. The Board must, on the objective facts, determine the seriousness of the employer unfair labor practices and consider the possibility of a fair rerun election. Note, *NLRB v. Gissel Packing Co.:* Bargaining Orders and Employee Free Choice, 45 N.Y.U. L. Rev. 318 (1970). Once the Board has done so, if supported by substantial evidence, its bargaining order must be enforced. Since we have found that the Board's conclusions are indeed amply supported by the record, we also enforce that portion of its order requiring Stevens to bargain with the Union.

IV.

In No. 29,037 the Union asks us to remand the case to the Board for the imposition of more meaningful and far-reaching remedies than those ordered. As we noted earlier the Board's order, which we have en-

forced in full, requires the Company to cease and desist from its unfair labor practices, to employ the discriminatees and make them whole, to bargain with the Union, and to post appropriate notices. Such an order is clearly traditional for the unfair labor practices found here. In addition the Board ordered, and we enforce, certain supplemental remedies which have become traditional for Stevens' plants. See *NLRB v. J. P. Stevens & Co., supra,* 417 F.2d at 534-35. The Company is ordered to convene its Statesboro employees and read them the Board's notice during working time, to mail a copy of that notice to each Statesboro employee, and to grant the Union reasonable access to its bulletin boards for a period of one year. The Union complains of the Board's failure to provide the following additional remedies:

> "(1) furnish the Union with the names and addresses of all employees in the Company's plants in North Carolina, South Carolina and Georgia; (2) post notices in all of the aforementioned plants; (3) permit a Union representative to enter these plants for the purpose of delivering a one hour speech to employees on the advantages of union membership; (4) furnish the Union with the job classifications, wage rates and seniority lists for all employees in the Company's Statesboro, Georgia plant; and (5) make whole all employees in the appropriate unit at the Statesboro plant for those contractual benefits which would have accrued to them had the Company not unlawfully refused to

bargain, and had a collective bargaining agreement been consummated."

The Union acknowledges that there is a presumption that favors the Board, with its expertise, in its selection of remedies. As we noted in *Stevens V:*

"In determining whether a particular affirmative action ordered by the Board pursuant to its powers under § 10 (c), 28 U.S.C.A. 160(c), is appropriate, the reviewing Court must pay an unusually high degree of respect to the Board's conclusion — these remedies are "peculiarly a matter of administrative competence." *Fibreboard Paper Products Corp. v. NLRB*, 1964, 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed. 2d 233, 241. In *Virginia Electric & Power Co. v. NLRB*, 1943, 319 U.S. 533, 63 S.Ct. 1214, 87 L.Ed. 1568, the Supreme Court stated it in stringent terms: "[The order] should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." at 319 U.S. 540, 63 S.Ct. 1218, 87 L.Ed. 1574. Fresh emphasis on the peculiar respect due Board determination of remedies has been given by the Supreme Court in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547:

"It is for the Board and not the Courts * * * to make [the] determination [of remedies], based on its estimates as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions

of § 10(c) of the Act * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given *special* respect by reviewing Courts." at 395 U.S. 612, 89 S.Ct. 1939, 23 L.Ed. 2d 577, n. 32 (emphasis added).

And, in upholding a Board's order compelling the payment of fringe benefits as a part of the remedy for a § 8(a) (5) violation, the Court said of § 10 (c) this "grant of remedial power is a broad one." *NLRB v. Strong*, 1969, 393 U.S. 357, 89 S.Ct. 541, 21 L.Ed. 546."

417 F.2d at 537-38.

The Board's discretion, of course, is not unlimited. Thus, under section 10(c)'s "affirmative action" mandate there may be cases where the Board has gone too far. *See e.g., H. K. Porter Co. v. NLRB*, 1970, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 146. Conversely, there may also be cases where the Board has not gone far enough. *See, e.g., Food Stores Employees Union Local 347 v. NLRB*, D.C. Cir. 1970, 433 F.2d 541; *International Union of Electrical Radio & Machine Workers v. NLRB*, D.C. Cir. 1970, 426 F.2d 1243. Considering the plethora of Stevens' cases before the Board and the courts, we are convinced that, to the Company, the words of judicial and administrative admonition are as but "sounding brass or a tinkling cymbal." The Board is therefore under an obligation to devise some meaningful affirmative action to counter the Company's known predisposition to violate the

Act. The record in this case, however, reveals just such an effort by the Board. There has been over the years a careful tailoring of remedies to meet the peculiar problems posed at the Stevens' plants. The Union in effect argues that the Board could have done better. That judgment, however, unless there has been an abuse of discretion, is left for the Board. Finding no such abuse, we reject the Union's plea and enforce the order as it stands, praying that there will be no *Stevens VII*.

The Board's order is ENFORCED.

AINSWORTH, Circuit Judge, specially concurring:

I concur in the enforcement of the Board's order in this case, though not without some misgivings as to the propriety here of the Board's issuance of a bargaining order without a rerun election.

When the Union was unsuccessful in the original election by a vote of 198 to 110 against representation, the Regional Director set the election aside and ordered a second election, for failure of the Company to supply a list of names and addresses as required by N.L.R.B. in the "*Excelsior*" case (156 N.L.R.B. 1236 (1966)). The second election, however, was not held because the Union in the meanwhile had filed an unfair labor charge under Section 8(a) (5) of the Act that the Company had unlawfully refused to bargain. After a hearing the Examiner, and later the Board, agreed that the charge against the Company should be sustained. A bargaining order was issued, without the holding of the second election, on the basis of an

authorization card majority because of the Company's refusal to bargain and other unfair labor practices. The Board cited *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575, 89 S. Ct. 1918 (1969) as authority for its order.

In the proceeding before the Board, 117 employees of the Company intervened in the representation part of the hearing, contending that they signed the authorization cards on Union representations that they were signing to get an election, and that the cards could not properly be considered as authorizing collective bargaining. Ninety-two employee witnesses then testified substantially to this effect, putting at issue the question of whether the Union ever had a card majority. The 3 Union organizers also testified and denied any misrepresentations in obtaining the cards. The Examiner credited the Union witnesses but declined to believe the employee witnesses.

The evidence was, therefore, in sharp conflict, but in the absence of some unusual circumstance, we are obliged to accept the Board's findings (sustaining the Examiner) even if another choice might have been made had the matter been before us de novo. See *N.L.R.B. v. Monroe Auto Equipment Company*, 5 Cir., 1968, 392 F. 2d 559, 560-61, cert. denied, 393 U. S. 934.

Board policy in representation cases favors the holding of elections — in secret — as the most satisfactory and preferred method of ascertaining whether a Union has majority support. See *Gissel*, supra, 395 U. S. at 605, 89 S. Ct. at 1934 (1969). It is obvious that

such an election is better than the controversial and less reliable card authorization method.

It is arguable, however, whether laboratory conditions, insuring fairness and impartiality, could be had at a rerun election. But under all the facts and circumstances here, including the sharp conflict in the evidence and the recantation of a large number of employees of the cards they signed, such an election could be the best solution here. Then the troublesome question of whether the Board is imposing a minority Union on the majority of the Company's employees could be settled. Nevertheless, using the procedure approved by the Supreme Court in *Gissel*, the Board has issued a bargaining order without an election "and its choice of remedy must therefore be given special respect by reviewing courts." See *Gissel*, supra, 395 U. S. at 612, 89 S. Ct. at 1939 n. 32.

Since the Board's order is supported by substantial evidence, though conflicting, and our review is limited to a determination as to whether there is substantial evidence to support the Board's findings, I have resolved the matter in favor of the Board's decision and concur in enforcement of its order.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J. P. STEVENS & CO., INC., GULISTAN DIVISION,
Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner,

No. 28631

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 29037

JUDGMENT

Before: Thornberry, Goldberg, and Ainsworth, Circuit Judges.

THIS CAUSE came on to be heard upon the petitions of J. P. Stevens & Co., Inc., Gulistan Division, and Textile Workers Union of America, AFL-CIO, to review an order of the National Labor Relations Board issued against petitioner in No. 28631 on October 22, 1969, and upon cross-application of the National

Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 17, 1970, and has considered the briefs and transcript of record filed in this cause. On March 22, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that J. P. Stevens & Co., Inc., Gulistan Division, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: Apr. 13, 1971

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J. P. STEVENS & Co., INC. GULISTAN DIVISION and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO	Cases 10-CA-7261, 10-CA-7323, 10-CA-7364, 10-CA-7450

DECISION AND ORDER

On June 6, 1969, Trial Examiner Robert E. Mullin issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. Thereafter, Respondent, the Charging Party, and the Intervenors[1] filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

[1] At the hearing in Case 10-CA-7450, Don F. Hughes and approximately 113 other employees of Respondent appeared through counsel and were permitted to intervene, in order to challenge the validity of authorization cards obtained from them by the Union.

tional Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,[2] conclusions,[3] and recommendations[4] of the Trial Examiner.

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[2]We agree with the Trial Examiner that Respondent violated Section 8(a) (3) and (1) by refusing to employ Mary Frances Bradley for discriminatory reasons. The record reveals she applied for a job with Respondent before organizational activities commenced. At that time, she listed two active union supporters as her relatives on the application form. Bradley was then overweight. Personnel Manager Harrington told her that ". . . he couldn't use me on account of my weight for the insurance they were carrying," and that she would have to lose some weight. By April 30, 1968, after the organizational drive began, Bradley had lost approximately 85 pounds. Again she applied, telling Respondent she desperately needed a job. At this time Harrington asked her if she were related to Charles Waters (a prounion employee) and Truman Delano Cribbs (a union leader found to have been discriminatorily discharged by Respondent on March 26). When she acknowledged being closely related to both, Respondent told her he could not promise her a job. Later, on May 6, when Bradley again asked for a job, Harrington told her no job was available and she should not bother coming back. The record reveals that after Bradley's April 30 application, Respondent hired nine women. On these facts, against the strong background of the antiunion animus, we adopt the Trial Examiner's finding that Respondent refused to employ Bradley because of her relationship to active union supporters in violation of Section 8(a) (3) and (1). In doing so, we do not rely on Bradley's testimony regarding her conversation with the Mayor of Statesboro after the April 30 application.

In adopting the Trial Examiner's 8(a) (1) and (3) finding regarding William Gary Akins, we do not rely on the Trial Ex-

aminer's comments regarding Respondent's failure to withhold salary from Akins during his absence from work.

Respondent and the Intervenors have excepted to some of the credibility resolutions made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Such a conclusion is not warranted here. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

[3]The record reveals that upon learning of the presence of the Union, Respondent resorted to a campaign of extensive and egregious unfair labor practices in its efforts to thwart the Union's organizational drive. The timing of Respondent's unfair labor practices, commencing almost immediately after the organizational drive began and persisting until after the time of the election, persuades us that the unfair labor practices were calculated to, and in fact did dissipate the majority which the Union acquired between February 18 and March 18, 1968. In these circumstances we believe that a bargaining order is required to repair the effects of such unfair labor practices. For this reason, and also because Respondent's unfair labor practices were of such a nature as to make the erasure of their effects by traditional remedies and holding of a fair and coercion free rerun election improbable if not impossible, we are of the opinion and find that, on balance the rights of the employees and the policies of the act would better be effectuated by reliance on the employee sentiment as expressed in the authorization cards. Accordingly, as there is no question that the Union had been validly designated by a majority of the employees as their representative when the Union renewed its bargaining demand, we find that by refusing to honor the Union's bargaining demand and by engaging in the numerous unfair labor practices found by the Trial Examiner, Respondent violated Section 8(a) (5) and (1) of the Act, and that the policies of the Act will be effectuated by the imposition of a bargaining order to remedy the Respondent's refusal to bargain, as well as its other unfair labor practices herein found. *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575; *Sinclair Company* v. *N.L.R.B.*, 395 U.S. 575.

[4]The Charging Party has filed exceptions to the failure of the Trial Examiner to recommend a remedy which would make whole all of Respondent's employees for contractual benefits which would have accrued to them had Respondent not refused to bargain and had a collective-bargaining agreement been concluded. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving 8(a) (5) violations, and therefore find no merit in the said exceptions. See *Monroe Auto Equipment Company*, 164 NLRB No. 144.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, J. P. Stevens & Co., Inc., Gulistan Division, Statesboro, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Oct. 22, 1969.

FRANK W. MCCULLOCH, *Chairman*

GERALD A. BROWN, *Member*

SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

70-264

Supreme Court, U.S.
FILED
JUL 2 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1800~~

J. P. STEVENS & CO., INC.,
Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

AND

MILDRED G. BAILEY, ET AL., EMPLOYEES

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN CONCURRENCE FOR MILDRED G. BAILEY, ET AL., EMPLOYEES

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1809

J. P. STEVENS & CO., INC.,
Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

AND

MILDRED G. BAILEY, ET AL., EMPLOYEES

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN CONCURRENCE FOR MILDRED G. BAILEY, ET AL., EMPLOYEES

This brief is filed by Mildred G. Bailey, et al., Employees,[1] in response to the Company's petition for writ of certiorari. The Employees concur that the writ should issue for reasons hereafter stated. Adopted for purposes of this brief is the material in the Company's petition

[1] 117 employees of the Petitioner's Statesboro, Georgia, plant intervened in the representation portion of the Board hearing, filed their exceptions with the Board and argued in the cour below; hereafter, they are referred to as "Employees."

under the headings, "The Opinions and Judgment in the Court Below and the Decision and Order of the National Labor Relations Board," "Jurisdiction of This Court," "Question Presented," "Statutory Provisions Involved," and "Statement of the Case."

ARGUMENT

I.

THE COURT BELOW MISCONSTRUED THIS COURT'S GISSEL DECISION.

The Fifth Circuit Court misconstrued *Gissel*[2] by holding that majority employee union adherence is no longer necessary to imposition of a bargaining order in a representation dispute. The court below held that if "outrageous" unfair labor practices are present and if their coercive effects could not be eliminated by traditional remedies, then *Gissel* approved entry of a bargaining order "even where the union has never demonstrated majority support in an appropriate unit."[3] Having so ruled, the court continued:

> "We think that the present proceedings constitute one of those 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices which, under *Gissel*, justify the issuance of a bargaining order *despite the absence at one point of a Union-demonstrated majority.*"
>
> (12a) (Emphasis added.)

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2 N.L.R.B. v. Gissel Packing Co. 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed2d 547.

3 Appendix to Petition of J. P. Stevens and Company, Inc. for Writ of Certiorari, at page 8a; hereafter, "(____a)."

and also held:

> "In such an atmosphere the Board was warranted finding that *even if the Union never possessed a vald card majority, a bargaining order was appropriate* to combat Stevens' anti-union conduct." (14a) (Emphasis added.).

Gissel certainly authorizes no such holding. The language of Mr. Elihu Platt, Assistant General Counsel, National Labor Relations Board, is instructive:

> "Prior to *Gissel,* it was Board policy to decline to to issue a bargaining order as a remedy for employer misconduct where the union had not obtained majority status. Some are now suggesting that the Supreme Court in *Gissel* opened the door — although opinions vary as to how wide that door was left ajar — for the Board, in the exercise of its remedial powers, to issue bargaining orders in flagrant situations, where the employer had succeeded in thwarting what might have turned out to be a successful organizing drive. This view, so far rather hestitatingly espoused, would favor issuing a bargaining order without regard to whether the union *ever* had a majority. This com centator, speaking for himself of course, does not agree. The reference (in *Gissel*) to 'the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise' should not be taken out of context. Not even remotely did the Supreme Court intimate that this was its view. . . . (T)he . . . Court was adverting to . . . (a Fourth Circuit discourse) . . . on an obviously hypothetical, if not far-fetched situation, and was not expressing a legal position

> — the issue was not before it. . . . (A)fter the Supreme Court had completed its reference to the hypothetical situation conjured up by the Fourth Circuit and returned to its holding in the cases actually before it — in all of which majority status, had, of course, been achieved — it used the language, where there is also a showing that at one point the union had a majority. This, it is submitted, is wholly consistent with current Board law and suggests no departure."[4]

But the Fifth Circuit has unfortunately made its own departure, albeit an erroneous and critical one. No matter the nature of employer conduct, there still must be some expression of majority worker unit choice of unionization. Asserting a "history" of unfair labor practices, the court below apparently intended to punish the Company and in so doing obliterated the expressed anti-union animus of a *majority* of the Statesboro plant employees, thereby distorting *Gissel*.

The holding of *Gissel* aside, the Act sets out the need for majority union support before imposition of a bargaining order:

> "Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit . . . "[5]

The circuit court's failure to implement the statutory provision (that union representation be founded in majority

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4 Elihu Platt, **The Supreme Court Looks at Bargaining Orders Based on Authorization Cards**, 4 Ga. L. Rev. 796, 797 (1970) (Footnotes omitted.)

5 National Labor Relations Act, Sec. 9(a); 29 U.S.C. Sec. 159 (Emphasis added.)

employee selection) must be reviewed. Otherwise, unionization will be thrust upon a unit of workers, the greater number of whom do not want such representation, and the court will go on misapplying *Gissel* in future "bargaining order" cases.

II.

THE GISSEL DECISION HAS BEEN ERRONEOUSLY APPLIED TO THE CIRCUMSTANCES EXISTING IN THIS CASE.

As argued above, the court's construction of the legal significance of Gissel was wrong on the most vital of issues (representation), but yet to be dealt with is the question: When correctly construed and then applied to the particular circumstances of this case, does *Gissel* authorize entry of a bargaining order? We submit that the answer is "No."

A consideration of this matter must deal with the presence before this Court of 117 employees who do not want to be unionized; by their resistance to the entry of a bargaining order at every stage of this proceeding, these workers have demonstrated the absence of majority union support at the Company's Statesboro, Georgia, plant.[6]

Judge Ainsworth, in a special concurrence with the decision below, states that he is concerned about the imposition of representation on an unwilling majority:

> "Board policy in representation cases favors the holding of elections — in secret — as the most satisfactory and preferred method of ascertaining

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6 99 of the said employees were counted toward a supposed union majority of 52 in a 341 member unit on March 18, 1968; 104 of employees were counted toward a supposed majority of 58 in a 326 member unit on April 20, 1968.

> whether a Union has majority support. . . . It is obvious that such an election is better than the controversial and less reliable card authorization method. It is arguable, however, whether laboratory conditions, insuring fairness and impartiality, could be had in a rerun election. But under all the facts and circumstances here, including the sharp conflict in the evidence and the recantation of a large number of employees of the cards they signed, such an election could be the best solution here. Then the troublesome question of whether the Board is imposing a minority union on a majority of the Company's employees could be settled."[7]

Regrettably, the justice concurs in enforcement of the Board order, and cites *Gissel*. Contrariwise, it is submitted that *Gissel* requires no such noxious result as having union representation cast on an averse majority of workers. Rather, this Court expressed its concern for employee choice, saying,

> "The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehaviour. In fashioning a remedy in the exercise of its discretion, then the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in

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7 Appendix of Petitioner's Brief at pages 31a, 32a.

> the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."[8]

The lower court has concerned itself with remedial orders against the Company, without balancing the scales with recognition that in acting against the Company, it is also penalizing the blameless employees who do not want to be represented by a union, employer acts notwithstanding. Equitable consideration of the contending policies requires a real regard for "employee sentiment." The three barometers of that sentiment in the present case are the cards signed, the votes cast, and the presence here of the respondent employees.

The union lost the election almost 2 to 1, and the respondents' appearance evidences a majority anti-organization animus. Only the cards could possibly evidence union majority strength in the unit. But the cards were obtained from employees, all of whom live in an agrarian community, most of whom are totally unversed in the nature of unionization, and many of whom are illiterate. There is immense and often repeated testimony (by 92 employees) generally to the effect that the cards were signed upon the representation that they would be used to get an election, not to bring a union into the plant. These circumstances certainly demand a solution other than entry of a bargaining order.

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8 N.L.R.B. v. Gissel Packing Co., supra at 614, 5.

The interest of these respondents must be considered — employee wishes must be protected. The entry of comprehensive cease and desist orders and the holding of a second election would, once and for all, bring an equitable solution to this dilemma.

CONCLUSION

The Employees respectfully submit that the petition for certiorari should be granted.

B. Avant Edenfield

Charles H. Brown

Attorneys for Mildred G. Bailey, et al., Employees

June, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-264

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is not yet officially reported. The Board's decision and order (Pet. App. 35a-38a, A29-161)[1] are reported at 179 NLRB No. 47.

[1] The opinion of the Trial Examiner is not reproduced in the appendix to the petition, but is included in the appendix to the briefs in the court below, which is cited herein as "A." "Ex." refers to the volume of exhibits and "S.A." to the Board's supplemental appendix in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on April 13, 1971. The petition for a writ of certiorari was filed on June 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that the union had obtained valid authorization cards from a majority of the employees, and that the employer should recognize and bargain with the union on the basis of those cards.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 163, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

STATEMENT

The Board found that in February and March, 1968, the Company violated Section 8(a)(1) of the Act by threats, promises of benefit, unlawful interrogation, and an unlawfully broad, discriminatory no-solicitation rule, during the Textile Workers Union's election campaign at the Company's Statesboro, Georgia plant (Pet. App. 36a; A. 49-52). The Board further found that the Company violated Section 8(a)(3) by discharging three union adherents and refus-

ing to hire the relative of union adherents (Pet. App. 36a, n. 2; A. 52-73).

In upholding these findings—which are not disputed by the Company here—the court of appeals characterized the Company's anti-union drive as

> an extensive campaign of 'classic, albeit crude, unlawful labor practices' to defeat the Union * * * Supervisory personnel threatened that a Union victory would result in a reduction of work, extensive discharges, and even the closing of the plant. * * * Company officials engaged in blatant surveillance of Union activities. * * * Stevens' supervisors interrogated employees with regard to Union activities under circumstances that tended to be coercive and intimidating * * * and made promises of benefits calculated to undermine Union strength * * *. During a critical juncture in the Union campaign the Company granted certain benefits which * * * were designed to destroy Union support. * * * Finally, when the Union organizing effort began, the Company breathed new life into a long dormant rule prohibiting all solicitation at the plant, even on non-working time. [Pet. App. 6a-7a, citations omitted.]

The petition challenges the propriety of the Board's further findings, sustained by the court below, that the Union had obtained valid authorization cards from a majority of the employees during the campaign, and that the Company's extensive unfair labor practices made a fair election impossible and thus required a bargaining order. The facts relevant to this issue are as follows:

1. On January 24, 1968, Union organizers Riffe and Best stationed themselves on the access road outside the plant and distributed leaflets to employees as they entered and left (A. 79, 292-294, 305-307; Ex. 104). The leaflet enumerated the advantages of union organization, and urged employees to fill out and mail back to the Union the authorization card which appeared on one corner of the leaflet.[2] Approximately

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[2] The card read as follows (A. 77-78; Ex. 104):

TEXTILE WORKERS UNION OF AMERICA
AFFILIATE OF THE AFL-CIO AND CLC

I hereby join with my fellow workers at the ..... mill in organizing a union in order to better our conditions of life and secure economic justice, as is my right under the laws of the United States. To this end I declare that the Textile Workers Union of America, AFL-CIO and CLC, shall be my representative in collective bargaining over wages, hours and all other conditions of employment. I make this pledge of my own free will in the conviction that the united action of all workers through unions of their own choosing is the way to achieve the liberty of the individual for the benefit of all.

In addition, the card had a place for the employee's signature, the date, job description information, and the employee's address.

A second type of authorization card distributed by the Union read as follows:

TEXTILE WORKERS UNION OF AMERICA
AFFILIATE OF THE AFL-CIO AND CLC

I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in

70 of the cards distributed on January 24 were mailed back to the Union (A. 80; 294). On February 8, the Union organizers stationed themselves outside the plant and distributed another pamphlet which also had an authorization card attached. Approximately 30 of these cards were mailed back to the Union (A. 80; 295).

On both occasions, the organizers had little or no time to engage in discussions with employees as they drove by in their automobiles. In substance, they merely said that, if the employee wanted a union, he should sign the card on the leaflet and mail it back to the Union. At no time did the organizers mention an election. (A. 80; 295, 307, 311.)

After the second distribution of leaflets, Chief Union Representative McIver mailed a letter, which announced an organizational meeting on February 12, to all employees who had signed cards (A. 80; 296, Ex. 107). At this meeting, McIver told the employees who attended that, as soon as the Union received authorization cards from a majority of employees, the Union would demand that the Company recognize and bargain with it and would offer to prove its majority before an impartial third party. McIver predicted, however, that the Company would not recognize the Union and that thus "probably we would have to have an election, but only if J. P. Stevens and Co. would not recognize us." He also stated that the Labor Board

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respect to rates of pay, wages, hours of employment or other conditions of employment.

This card also had spaces for the employee's signature, job description, date, and employee's address (A. 78-79; see *e.g.*, Ex. 127).

would hold an election if 30 per cent of the employees signed authorization cards and emphasized that "we were not down here just to hold an election, we were down here to get the Union in, that it wouldn't serve any purpose just to come down and hold an election." (A. 81; 297-298.) McIver distributed copies of an organizing committee sheet, and read the four lines which appeared at the top to the employees.[3] During the organizing campaign, approximately 153 employees signed these sheets (A. 82; 300-301).

At the meeting on February 15, McIver was questioned about Plant Manager Bachman's statement that employees' authorization cards would be put upon the table for him to see. McIver answered that "the only time that would happen * * * was when the majority of the employees signed up in the Union and the Company later illegally destroyed that majority * * *" (A. 82; 303). McIver told the approximately 120 employees in attendance that signing the union card "was definitely proving they was for the union" (A. 82; 298, 303).[4]

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[3] These were:

> I hereby authorize the Textile Workers Union of America, AFL-CIO, to use my name for the purpose of organizing Gulistan Plant—J.P. Stevens & Co., Inc. This will include sending my name to the National Labor Relations Board as a Voluntary Organizer. Also to be used in the signing of Union leaflets. [A. 81, 300; Ex. 136, 138.]

[4] At neither the February 12 nor the February 15 meetings did McIver or Union Representatives Riffe or Best state that the *only* purpose of the cards was to get an election (A. 82; 298, 307, 308, 310, 392-393, 394-395, 396, 434, 438-439, 440, 317-318, 328, 329, 352-353).

2. On February 17, the Union wrote the Company a letter in which it claimed to represent a majority of the production and maintenance employees; demanded recognition as the exclusive representative of those employees; and added that, if the Company had any doubt of its majority status, the Union would submit the authorization cards in its possession to a disinterested third party who could check the signatures thereon with those on the Company's payroll records (A. 75-76; Ex. 108). The Company replied that it had reason to believe that a majority of the employees did not want union representation; that it did not wish a third party to check cards; and that it assumed the Union would refer the matter to the Board for its disposition (A. 76; Ex. 110).

The Union filed an election petition with the Board on February 21, which scheduled an election for April 22-23. At the representation hearing held on March 18, Union Representative Horn told the Company's counsel that the Union had a substantial majority among the employees in the unit and that its previous demand for recognition was a continuing one (A. 76; Ex. 133).

The Union lost the election, 198 to 110, and thereafter filed objections based on the Company's unfair labor practices and its failure to provide the Union with a list of the employees' names and addresses in conformity with the Board's *Excelsior* requirement (Ex. 119-120).[5] The Board's Regional Director, not-

[5] See *Excelsior Underwear, Inc.*, 196 NLRB 1236; *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759.

ing that "it is unnecessary to consider the [Union's] remaining objections," set the election aside and directed a second election because of the Company's failure to submit the *Excelsior* list (Ex. 121-124). The Union subsequently filed unfair labor practice charges against the Company, including a charge alleging that it had unlawfully refused to bargain. A complaint issued on these charges.[6]

3. In the unfair labor practice proceeding, the Board's Trial Examiner found that 224 out of 343 employees had signed authorization cards by March 18, when the Union renewed its bargaining demand (A. 77-79, 135-136). The Company challenged the cards of 92 employees on the ground that they had been secured by the misrepresentation that they would be used only to obtain an election. The Examiner declined to count 7 of these cards, which he found were signed after March 18 (A. 136-139). The Examiner rejected the Company's challenge to the remaining 85.

The Examiner found that 19 cards[7] were obtained

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[6] These charges "blocked" a second election under the Board's policy of not conducting, in the absence of special circumstances not present here, a representation election during the pendency of meritorious unfair labor practice charges. See *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307-308 (C.A. 5).

[7] George Bland (A. 88; 414); Don Hughes (A. 96-97; 442-443); Jimmy C. Miley (A. 113-114; 448); Cliff Rucker (A. 113-114; 517); Fred Bazemore (A. 87; 507-508); Linda M. Bolton (A. 114; 415); Winard O. Burke (A. 114; 429-430); Jerry Collings (A. 114; 534); Glenda Davis (A. 92; 527-528); Henry Davis (A. 93; 504-505); Veronica Keel (A. 114; 424-425); Rosa L. Lewis (A. 114; 423); Carolyn Lovett (A. 114; 437); John C. Mills (A. 114; 349); Wayne Moore (A. 102-

at the Union meetings of February 12 and 15, and he credited the Union organizers' testimony that the employees were told at those meetings that the cards could form the basis of a bargaining request. Nine cards [8] had been solicited at the access road. The Examiner also credited the organizers' testimony that they did not mention an election while handing out the leaflets there. The Examiner rejected the testimony of 14 employees [9] that organizers Riffe or McIver had misrepresented the purpose of the cards on other occasions during the campaign; nor did he credit the testimony of 21 employees [10] who testified

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103; 441); James Pounds (A. 114; 454); Argentine Raymond (A. 114; 418); Woody Royal (A. 105; 538); Sammy Strouse (A. 107; 455-456).

[8] Ronald D. Bowen (A. 88-89; 324); Dollie Dyches (A. 111; 353); Jesse D. Glisson (A. 111; 358-360); Bernard T. Hendrix (A. 111; 350); Bobby Key (A. 110-111; 365-367); Council Taylor Lee (A. 110; 327); Lester Parker (A. 111; 398-399); Jerry Potter (A. 104; 362-363); Walter Smith (A. 110; 377-378).

[9] Alva Lee Anderson (A. 126; 474-475); Jack Bragg (A. 115; 433); Gene T. Dixon (A. 126; 498); James A. Lanier (A. 126; 443); Dewitt Love, Jr. (A. 126; 401); Marian McGrady (A. 126; 477); Emma McKeehan (A. 126; 492); Thomas Mock (A. 126; 496); Doris Peacock (A. 126; 464); Sallie Ward (A. 125; 487-488); Hazel Brown (A. 129; 525); J. W. Mock (A. 128-129; 501); Geneva Stephens (A. 129; 473); Johnnie Peace Tremble (A. 129; 480).

[10] Jessie Robert Bazemore (A. 87; 326); Mary B. Bolton (A. 116; 417); Daniel Dyches (A. 131-132; 509-510); Larry Finch (A. 116; 485); Thomas G. Hendrix (A. 130; see p. 2772 of the original transcript); Glenda M. Holloway (A. 130; 500); John P. Ivey (A. 130; 481); Malcolm Mock (A. 116; 483); Jimmie Reddick (A. 130; 532); Willie D. Robinson (A. 104-105; 386-387); John H. Sampson (A. 130; 403); Charles

that employee union adherents had misrepresented the purpose of the cards.

The Examiner accepted as valid the cards of 13 employees who merely testified that they did not read the card or did not understand it; [11] that they were told the card would never be shown to the Company [12] or that it was needed for an election; [13] or that they signed with the understanding that an election was the card's purpose.[14] Finally, he accepted as valid the cards of seven employees [15] who claimed that they were

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Stewart (A. 116; 506); Walter V. Street (A. 116; S.A. 9); J.C. Marsh (A. 100-101; 387-388; S.A. 7); Mildred Bailey (A. 115-116, 496-497; S.A. 14); Sue Jones (A. 98; 529-531); Ruth J. Kendrick (A. 115; 493-494); Ida Ann McGahee (A. 125; 461, 445); Thomas Davis (A. 109; 406); Donald Brannen (A. 132-133, 421-422; Ex. 182; S.A. 7); Regis Wise (A. 109; 409-410).

[11] Jack Bazemore (A. 84; 426-428); Rosa Byrd (A. 124; 536); William Hodges (A. 85; 332); William H. McMillan (A. 86; 436); Bernie Lee Robinson (A. 86; 331-332).

[12] Gladys Dyches (A. 85; 335-338); William H. McMillan (A. 86; 436).

[13] Rosa Byrd (A. 124; 536); Ralph Evans (A. 94; 440); Dell Hendley (A. 85; 491); Harold McCray (A. 86, 94; 435, S.A. 8); Hugh Strickland (A. 124; 413).

[14] Howell Berry (A. 124; 345-357, 407-408); J.C. Brown (A. 124-125; 345-346); Gladys Dyches (A. 85; 355-356); William H. McMillan (A. 86; 435); Gordon Mincey (A. 124; 471-472, S.A. 12).

[15] Otha Smith (A. 106-107; 369-372); Jerry Woodcock (A. 109; 457-459); James Jones (A. 97-98; 361-362); Ozell Lawrence (A. 98-99; 378-381); Fred Wiley (A. 108; 373-376); Ike McNeely (A. 100; 339-340); Hubert J. Miller (A. 102; S.A. 6).

told that the purpose of cards was only to secure an election *after* they had signed them, and cards of two employees [16] who, he found, were well aware of the purpose of the card and thus could not have relied on the statements they attributed to the organizers.

4. The Board sustained the Examiner's finding that the Union had valid authorization cards from a majority of the employees (Pet. App. 36a). Applying the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, it further concluded that the Company's "extensive and egregious unfair labor practices" had dissipated "the majority which the Union acquired between February 18 and March 18, 1968," and that a bargaining order was "required to repair the effects of such unfair labor practices" (Pet. App. 37a, n. 3). The court of appeals held that the Board's findings and conclusions were amply supported by the record, and that a bargaining order was clearly appropriate under *Gissel* (Pet. App. 1a-32a).[17]

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[16] Ruth Durden (A. 93; S.A. 9-11); Gerald McMillen (A. 99-100; 367-368).

[17] The court also ruled that a bargaining order would be appropriate even in "the absence at one point of a Union-demonstrated majority" because of the "outrageous" nature of petitioner's unfair labor practices. We believe the Court need not consider this alternative ground of the court of appeals' ruling because that court was clearly correct in affirming the Board's conclusion that the union had, at one point, obtained a legitimate majority.

ARGUMENT

Petitioner's principal contention (Pet. 12-22) is that the Board erred in counting the cards of the 92 employees [19] who, it asserts, signed pursuant to the misrepresentation that the cards would be used solely for purposes of an election. This purely factual issue was correctly resolved against petitioner by the Examiner, whose findings were affirmed by the Board and the court of appeals. Further review by this Court is not warranted.

The Examiner did not, as petitioner contends (Pet. 26-27, n. 1), simply credit the Board's witnesses while rejecting wholesale the testimony of the Company witnesses.[20] He heard and viewed the witnesses and carefully evaluated each of the questioned cards in accord with the principle which this Court approved in *Gissel*: "[E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to disregard and forget the language above his signature"; "[t]here is nothing in-

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[19] As noted, *supra*, p. 8, the Board only counted 85 of these cards.

[20] Petitioner cites (Pet. 13-15) the testimony of 10 "representative" witnesses. Apart from the fact that the Examiner discredited all of these witnesses, two—Bradd (A. 524) and Griner (A. 521)—signed after March 18 (A. 136-138); four—Thomas Mock (A. 496-497), John Ivey (A. 480-481), Doris Peacock (A. 465-466), and Jessie Mock (A. 500-503)—signed after the Union's election petition had been filed (A. 126-127, 128-129, 130, 131); one—Freddie Wiley (A. 373-376)—signed the card before the alleged misrepresentation was made (A. 108).

consistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election." 395 U.S. at 606-607. The credited testimony does not show that the Union solicitors in this case exceeded these limits. See also *id.* at 584, n. 5.[21] The fact that the Examiner credited the testimony of one side's witnesses and rejected that of the other side's witnesses does not prove that he improperly evaluated the evidence. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-341.

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[21] The fact that 117 employees intervened on behalf of the Company does not militate against a bargaining order here, as the court of appeals correctly held (Pet. App. 21a-26a). Several of the employees were active union adherents during the campaign (A. 450-451, 324). As the court held (Pet. App. 22a), the Board properly concluded that their "recantation was simply a product of Stevens' unlawful conduct." Cf. *International Union, United A., A., & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 808-809 (C.A. D.C.), certiorari denied, *sub nom. Preston Products Co., Inc.* v. *National Labor Relations Board*, 392 U.S. 906. The Board has recently held that the Company unlawfully withheld overtime and wage increases from two employees who testified for the Board in the instant case. *J.P. Stevens & Co.*, 190 NLRB No. 109, 77 LRRM 1333, pending on petition to review, *sub nom. Textile Workers Union* v. *National Labor Relations Board*, C.A. D.C.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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